No. 08-1278

In The

Supreme Court of the United States

LYNN MAGNANDONOVAN,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District, Division Five

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiff Lynn Magnandonovan respectfully submits this brief in reply to defendant City of Los Angeles's brief in opposition to plaintiff's petition for a writ of certiorari. This reply brief addresses two arguments in defendant's opposition brief: (1) that this Court lacks jurisdiction because the due process issue asserted in the petition for a writ of certiorari was not adequately presented below, *see* Oppo. at 8-11; and (2) that a lack of judicial impartiality below cannot reasonably be inferred here, even though the appellate panel's decision was based on an assessment of the credibility of a colleague's trial testimony, because appellate judges routinely review the decisions of other judges, *see* Oppo. at 15. The first argument lacks merit because this Court has jurisdiction to remand a case for consideration of a due process issue regardless of whether that issue was adequately presented below. The second argument lacks merit because an appellate court's assessment of the credibility of a colleague's trial testimony is not analogous to appellate review of a colleague's decision in a case.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO, AND SHOULD, REMAND THE CASE FOR CONSIDERATION OF THE DUE PROCESS ISSUE IN LIGHT OF THE COURT'S FORTHCOMING *CAPERTON* DECISION.

Defendant contends this Court lacks jurisdiction to grant certiorari because, according to defendant, plaintiff did not adequately present her due process claim to the California Court of Appeal. Oppo. at 10-11. Defendant does *not* address plaintiff's alternative request that, if this Court does not grant certiorari, the Court vacate the judgment of the California Court of Appeal and remand the case for further consideration in light of this Court's forthcoming decision in *Caperton v. A.T. Massey Coal Company, Inc.* *See* Pet. at 7-8.

Plaintiff was unable to raise the due process issue below prior to the California Court of Appeal's decision because the issue did not become evident until the decision was issued, when, with no prior warning, the court undertook to assess the strength and credibility of its colleague's trial testimony. Thereafter, plaintiff timely raised the issue in a petition for rehearing filed in the California Court of Appeal. *See* App. 1. In the petition for rehearing, plaintiff argued that the California Court of Appeal should have recused itself because of an appearance of impropriety. *See* App. 11-13. This Court will decide in *Caperton* whether such appearance of impropriety violates due process. Thus, by asserting the appearance

of impropriety, plaintiff's petition for rehearing presented the due process issue.

Regardless, however, of whether plaintiff adequately presented the due process issue below, this Court has jurisdiction, "in the interests of justice," either to consider whether a due process violation is "apparent on the particular facts of [the] case," or to remand the case to the California Court of Appeal for consideration of the due process issue in light of *Caperton*, with the latter being "for prudential reasons . . . preferable." *Wood v. Georgia*, 450 U.S. 261, 265-66 & n. 5 (1981). That is why plaintiff's petition for a writ certiorari includes a request that this Court remand the case to the California Court of Appeal for further consideration in light of *Caperton*. For prudential reasons that is the preferable course of action. It is indisputable that this Court has jurisdiction to take that course.

II. APPELLATE REVIEW OF A COLLEAGUE'S DECISION IS NOT ANALOGOUS TO AN ASSESSMENT OF THE CREDIBILITY OF A COLLEAGUE'S TRIAL TESTIMONY.

On the merits, defendant contends that a lack of judicial impartiality cannot reasonably be inferred here because appellate judges "are called upon on an almost daily basis to review the *decisions* of other judges regardless of whether they sit on the same or another court; it is a routine part of their work and friendship or collegiality plays no part in their

decisions." Oppo. at 15, emphasis added. This analogy is fundamentally flawed. There is an immense difference between routine appellate review *of a decision* by another judge and the situation here, where the appellate court undertook to assess the *credibility of trial testimony* by a colleague who sits on the same court. That is hardly routine; it is extraordinarily unusual.

It is one thing for an appellate court to determine whether a colleague committed legal error in deciding a case; it is quite another for an appellate court to decide whether trial testimony by a member of the same bench is trustworthy. The judicial process routinely and necessarily relies on appellate courts to do the former. It is probably asking too much of appellate courts, however, to do the latter, and it is certainly asking too much of the public to accept such a thing unquestioningly. The appearance of impropriety is manifest.

CONCLUSION

For the foregoing reasons, even if this Court determines that the due process issue was not adequately presented below, the Court can and should remand the case to the California Court of Appeal for consideration in light of this Court's decision in *Caperton*.

Respectfully submitted,

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

LYNN MAGNANDONOVAN,

Plaintiff, Respondent and Cross-Appellant,

vs.

CITY OF LOS ANGELES,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR LOS ANGELES COUNTY (BC286908)
THE HONORABLE W. MICHAEL HAYES, ASSIGNED

PETITION FOR REHEARING

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[1] INTRODUCTION

The majority opinion in this case re-weighs the trial evidence in a traditional substantial evidence appeal. The legal authorities on which the majority relies do not support such appellate second-guessing of this jury verdict following a trial with live witness testimony.

In re-weighing the trial evidence, the majority relies on the three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). Under that test, according to *Guz v. Bechtel* [2] *National, Inc.* (2000) 24 Cal.4th 317 (*Guz*) and *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 (*Reeves*), an appellate court

may re-weigh the evidence presented on a pre-verdict motion such as a motion for summary judgment.

Those authorities are inapposite here. The majority has not followed this Division's own holding in *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189 (*Caldwell*) that the *McDonnell Douglas* burden-shifting test "'drops from the case'" if and when "the case is submitted to the jury." (*Caldwell, supra,* at p. 204.) Once a case goes to a jury, the *McDonnell Douglas* construct disappears, and on appeal the traditional substantial evidence test applies – meaning the Court of Appeal may *not* re-weigh the trial evidence, as the majority has done here.

The court should grant a rehearing to allow review of the judgment for sufficiency of the evidence under the proper standard of appellate review, which precludes the court from re-weighing appellant's trial evidence and second-guessing the jury.

Also, we respectfully request that the court recuse itself upon granting a rehearing. Once it became evident during the court's decision-making process that the majority's re-weighing of the evidence would turn in part on the strength of trial testimony by one of the justices' colleagues on the Second Appellate District, the court should have recused itself – regardless of the absence of any actual misconduct – in order to avoid an *appearance* of impropriety. The court can remedy its not doing so by recusing itself now.

Finally, we point out that the court has omitted to address one of the issues plaintiff has presented, concerning her claim for deprivation of constitutional due process under 42 U.S.C. § 1983.

[3] DISCUSSION

I.

THE MAJORITY HAS APPLIED AN UNRELATED STANDARD OF REVIEW TO REWEIGH THE TRIAL EVIDENCE IN A TRADITIONAL SUBSTANTIAL EVIDENCE APPEAL.

The majority opinion makes clear why this judgment has been reversed: Two justices of this court believe that plaintiff's evidence was insufficient as a matter of law because defendant's evidence was "strong" while plaintiff's evidence was "weak." (Maj. opn. at pp. 3, 20, 35.) This is *re-weighing* the evidence presented to a jury – something appellate courts are not supposed to do, according to innumerable recitations of the substantial evidence rule.

The majority opinion would create a new exception to the post-trial substantial evidence rule – solely for employment discrimination cases – based on a misapplication of the *McDonnell Douglas* burden-shifting test. Under that test, on an appeal challenging a summary judgment ruling, the Court of Appeal may re-weigh the plaintiff's documentary evidence by assessing "'the strength of the plaintiff's prima facie case'" of retaliation, and may rule for the

defendant on the issue of retaliatory motive if that evidence raises only "a weak inference of prohibited bias." (*Guz, supra,* 24 Cal.4th at p. 362 & fn. 25.) The majority here, however, has relied on the *McDonnell Douglas* construct to re-weigh *live witness testimony at trial* – not documentary evidence on a summary judgment motion – and has reversed the judgment because, in the majority's view, the plaintiff's "weak" evidence of retaliatory motive (*id.* at pp. 3, 35) was outweighed by defendant's "strong" evidence of non-retaliatory motive (*id.* at pp. 3, 20).

[4] But the *McDonnell Douglas* construct – with its special rule allowing the appellate court to re-weigh documentary evidence presented on a motion for summary judgment – *disappears* once the case is submitted to a jury, and is replaced by the traditional substantial evidence rule. This court (Division Five of the Second Appellate District) itself said so in *Caldwell, supra,* Cal.App.4th at page 204: "[I]f and when the case is submitted to the jury, the construct of the shifting burdens 'drops from the case,' and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race- or age-neutral reasons for the employment decision."

Other authority is in accord with *Caldwell*: "Once the case is submitted to the jury – and, therefore, for substantial-evidence review on appeal – these frameworks [prescribed by *McDonnell Douglas*] drop from the picture and *traditional substantial evidence review* takes their place in the analysis." (*Horsford v.*

Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 375, italics added.) Such traditional substantial evidence review means it is up to the *jury* "to decide the ultimate question: whether the employee has proven that the employer intentionally discriminated against the employee." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1117.) It is left to the trier of fact "to decide which evidence it found more convincing." (*Id.* at p. 1118.) The appellate court's role "is simply to review the record to determine whether there was sufficient *substantial evidence*" to support the judgment. (*Id.* at p. 1120, italics added.) The appellate court "is not in a position to weigh any conflicts or disputes in the evidence, or to assess the credibility of the witnesses; that is the province of the trial court alone." (*Id.* at p. 1121.) As Justice Richard M. Mosk observed in his dissenting opinion here: "In light of the standard governing our substantial evidence [5] review, this court cannot reweigh the evidence." (Dis. opn. at p. 4.)

It makes jurisprudential sense that an appellate court cannot use the *McDonnell Douglas* construct to justify re-weighing the trial evidence in an employment discrimination case. Unlike summary judgment proceedings, which are on a paper record that the appellate court is just as well positioned as the trial court to assess, fact-finding in a jury trial depends on live witness testimony that the jury is uniquely positioned to assess. "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy,

their calmness or consideration." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243.) That is why the jury is "the *exclusive* judge of the credibility of the witnesses." (*Ibid.*, original italics.) And that is why the *McDonnell Douglas* construct cannot be used to justify appellate second-guessing of the jury's verdict here. Because of the jury's superior position as the arbiter of live witness credibility, it is left to the jury – even in an employment discrimination case – "to decide which evidence it found more convincing." (*Muzquiz v. City of Emeryville, supra,* 79 Cal.App.4th at p. 1118.)

The majority opinion cites *Guz, supra,* 24 Cal.4th 317, as support for re-assessing the strength of plaintiff's trial evidence in this case. (Maj. opn. at p. 20.) The court in *Guz* did in fact re-weigh the evidence there. (*See Guz, supra*, 24 Cal.4th at p. 362, fn. 25 ["Guz's circumstantial evidence of intentional discrimination, even if fully credited and technically sufficient to establish a prima facie case, raises, at most, a weak inference of prohibited bias."].) But *Guz* itself makes clear that the re-weighing in that case depended on the procedural posture of the appeal as being from a *summary judgment* ruling. The very first sentence of *Guz* states: "This case presents questions about the law governing claims of wrongful discharge from employment *as it* [6] *applies to an employer's motion for summary judgment*." (*Guz, supra,* 24 Cal.4th at p. 325, italics added.) As Justice Kennard observed, the court was "concerned not with the sufficiency of evidence to sustain a jury verdict of age

discrimination, but only with whether Guz's evidence raises 'a triable issue of material fact' " under Code of Civil Procedure section 437c. (*Guz, supra,* at p. 384 (dis. opn. of Kennard, J.).) *Guz* says nothing about the law governing claims of wrongful discharge as it applies to appellate review of a *jury verdict*.

The majority opinion also relies on *Reeves, supra,* 530 U.S. 133, which is the source of *Guz's* re-weighing of the documentary evidence in that summary judgment appeal. (Maj. opn. at pp. 16-17.) But *Reeves*, too, did not address appellate review of a jury verdict. The issue in *Reeves* was whether the federal district court should have granted a motion for *judgment as a matter of law* – the federal procedural equivalent of a nonsuit or directed verdict – which, under rule 50 of the Federal Rules of Civil Procedure, "may be made at any time *before the case is submitted to the jury.*" (Fed. Rules Civ.Proc., rule 50(a)(2), 28 U.S.C., italics added.) In that context, the court observed that "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [Citation.] To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from *review under Rule 50. . . .*" (*Reeves, supra*, 530 U.S. at p. 148, italics added.) This observation says nothing about appellate review *after*

submission of the case to the jury. Indeed, Justice Ginsburg, in a concurring opinion, elaborated that "the ultimate question of liability ordinarily should not be taken from the jury" once the [7] plaintiff has presented prima facie evidence from which the jury could infer a retaliatory motive, and that "the Court's opinion leaves room for such further elaboration in an appropriate case." (*Id.* at p. 155 (conc. opn. of Ginsburg, J.).) *Reeves*, like *Guz*, says nothing about the law governing claims of wrongful discharge as it applies to appellate review of a *jury verdict*.

No California appellate court – in a published or unpublished opinion – has ever used *Guz, Reeves,* or *McDonnell Douglas* to re-weigh trial evidence on appeal after a jury verdict. This court should not be the first to do so. The most fundamental rule of appellate review forbids it.

II.

THE COURT SHOULD HAVE RECUSED ITSELF ONCE IT BECAME EVIDENT THAT THE MAJORITY'S DECISION WOULD TURN IN PART ON THE STRENGTH OF TESTIMONY BY A WITNESS WHO NOW SITS AS A COLLEAGUE AT THE SECOND APPELLATE DISTRICT.

On January 10, 2007, plaintiff's trial counsel wrote to Administrative Presiding Justice Roger W. Boren and Presiding Justice Paul Turner to advise

them that, because several witnesses in this case were sitting Los Angeles Superior Court judges, that entire court had recused itself and the matter had been tried before a judge of the Orange County Superior Court. Counsel asked that the Second Appellate District likewise recuse itself, on the ground that a person aware of the facts might reasonably entertain a doubt that the justices would be able to be impartial. Counsel pointed out that Justice Laurie Zelon, formerly a judge of the Los Angeles Superior Court and now a justice of the [8] Second Appellate District, had testified against plaintiff at trial, highlighting the potential for an appearance of impropriety.

Presiding Justice Turner responded by letter dated January 18, 2007. The letter stated: "After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would *not* entertain a doubt as to our capacity to remain impartial. At present the Division Five justices decline to recuse themselves. *If facts develop at a later date* that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves." (First italics in original, second italics added.)

It is now evident that, during this court's decision-making process, facts did indeed develop that should have caused the court to recuse itself – facts that would lead "a reasonable person aware of the facts [to] doubt the [court's] ability to be

impartial." (Cal. Code Jud. Ethics, canon 3E(4)(c), italics added; see *Housing Authority of Monterey County v. Jones (2005) 130 Cal.App.4th 1029,* 1040, fn. 6.) Once the majority determined that it would not apply the traditional substantial evidence rule, but instead would re-weigh the evidence – relying in part on the strength of Justice Zelon's testimony (see maj. opn. at pp. 27-28, 33) – the majority's inevitable trust in their colleague's credibility would lead a reasonable person to doubt their ability to be impartial in assessing the strength of that testimony. At that point in the decision-making process, this court should have recused itself on the ground that "[a] judge shall avoid impropriety *and the appearance of impropriety* in all of the judge's activities." (Cal. Code Jud. Ethics, canon 2, italics added.)

We do not mean for an instant to suggest that the majority or Justice Zelon actually engaged in any misconduct. We presume that nothing of the sort has ever occurred here. But that is beside the point. This court is held to [9] a higher standard than that of the work-a-day attorney. (See *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308, fn. 14.) Judges not only must refrain from *actual* misconduct, but also must refrain from conduct that creates even an *appearance* of impropriety – conduct that, "'no matter how innocent and well intentioned, can only undermine public confidence in the integrity and impartiality of the judiciary.'" (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 774; see also *Yaqub v. Salinas Valley Memorial Healthcare System* (2004)

122 Cal.App.4th 474, 486 ["The question is not whether the judge is actually biased, but 'whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.'"].) Recusal is required whenever the facts would lead a reasonable lay person simply to "'doubt'" a judge's ability to be impartial. (*In re Wagner* (2005) 127 Cal.App.4th 138, 148 ["'we need not determine whether there is actual bias'"].)

We believe that such facts exist here. Once it became evident that the majority's decision would turn in part on the strength of testimony by a trusted colleague, the court should have recused itself to avoid even the *appearance* of impropriety. Accordingly, we respectfully ask this court, upon granting a rehearing, to recuse itself for transfer of the case to another appellate district.

III.

THE COURT HAS NOT ADDRESSED PLAINTIFF'S SECTION 1983 CLAIM.

In our letter brief of October 17, 2008, we asserted that this court may affirm the judgment based on treatment of plaintiff's third and fourth causes of action as tendering a statutory claim for deprivation of constitutional due [10] process under 42 U.S.C. § 1983, or may remand the cause for a retrial on that claim. The court's decision does not address this point. It should be addressed on rehearing.

CONCLUSION

For the foregoing reasons, the court should grant a rehearing to allow review of the judgment for sufficiency of the evidence under the proper standard of appellate review, as well as for a decision on plaintiff's section 1983 claim, and should recuse itself for transfer of the case to another appellate district.

Dated: November 6, 2008

Respectfully submitted,

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[11] CERTIFICATE OF WORD COUNT

The text of this petition consists of 2,532 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: November 6, 2008

JON B. EISENBERG